Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Communications Assistance for Law Enforcement Act and Broadband Access Services	ET Docket 04-295 RM-10865

REPLY COMMENTS OF VERIZON ON COMMISSION'S NOTICE OF PROPOSED RULEMAKING AND DECLARATORY RULING

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Verizon has long been an industry leader in developing and implementing CALEA solutions. And Verizon remains committed to working with the industry and law enforcement to develop additional industry standards and comply with its obligations under CALEA. In this proceeding, Verizon seeks the adoption of specific rules that meet the needs of law enforcement in a manner consistent with CALEA's language and purposes.

The Commission should affirm its tentative conclusion that whether CALEA applies to a particular service is independent of how such a service is classified for regulatory purposes under Title I or Title II of the Communications Act. Any approach that attempted to read the two statutes in parallel would contradict the plain language of CALEA by ignoring the "substantial replacement" provision of its definition of "telecommunications carrier" and would undermine the statute's purposes.

The Commission should also affirm its tentative conclusion that VoIP services fall within the substantial replacement provision of CALEA because they can be used to make voice phone calls that have traditionally been provided using local telephone exchange service. As the record makes clear, however, the Commission should not adopt its proposed "managed v. non-managed" test for determining which specific VoIP services are subject to CALEA. Instead, it should adopt a test by which any VoIP provider that uses equipment such as application servers, media gateways, or networks falls within CALEA, regardless of whether the service may be labeled as "non-managed" or "peer to peer."

The Commission should also make clear that any CALEA obligations fall equally on all competing providers of broadband access services. At the same time, the Commission should reaffirm the admonition in CALEA's legislative history that CALEA was not intended to provide "one stop shopping" for law enforcement and that, to the extent broadband access service

providers are subject to CALEA, in many cases the underlying network provider will not be the entity responsible for providing law enforcement with the relevant call-identifying information or content.

With respect to future services, the Commission should affirm its tentative conclusion not to require any "pre-approval" process. The Commission should also reject the DOJ's proposed procedures and requirements for seeking CALEA rulings in advance of deploying new services, as well as its suggestion that carriers that do not employ such procedures will face more vigorous enforcement. These procedures would amount to a back-door means of requiring law enforcement or Commission approval for how services are designed and structured, which CALEA specifically prohibits.

The record establishes that the Commission's proposed 90-day deadline for compliance is unreasonable and unworkable. Even the DOJ proposes a longer timeframe of 12 months for CALEA compliance. That 12-month time period is likely reasonable for VoIP services because there are already standards and available solutions. It is not, however, adequate for broadband access services for which there currently are not standards or generally available CALEA solutions. For these services, the Commission instead should require the standards organizations to submit regular reports on their progress and, once the broadband access standard is complete (expected in 2005), initiate an expedited proceeding to determine a reasonable compliance deadline in light of whatever standards are adopted. The Commission should also judge section 109 petitions consistent with the statutory "reasonably achievable" standard, and must, consistent with that standard, consider whether technology is currently available that would permit the carrier to comply.

As virtually all the commenters agree, the Commission should resolve technical issues relating to call-identifying information in the standards process instead of this proceeding and it should not require any carrier to use a "trusted third party" approach to CALEA compliance. In addition, as the majority of commenters explain, the Commission should not create any additional enforcement procedures because they are both unnecessary and contrary to CALEA.

Finally, with respect to cost recovery, the Commission should not adopt the DOJ's suggestion that CALEA precludes any recovery of so-called "capital costs" for post-1995 equipment. Although CALEA itself does not provide a mechanism for recovery of those costs (except when compliance is not reasonably achievable), Title III permits carriers to recover from law enforcement their "reasonable expenses" for "facilities or assistance" in provisioning intercepts, which can include "capital costs" such as those associated with backhauling traffic to deliver it to law enforcement. In addition, the Commission should permit carriers to recover their CALEA compliance costs, to the extent not recovered from law enforcement, from their customers in any legal manner they choose, including a competitively-neutral surcharge applied on wholesale and retail customers.

I. Services Subject to CALEA

A. CALEA Definitions of "Telecommunications Carrier" and "Information Services"

As Verizon explained in its opening comments, the "substantial replacement" prong of CALEA's definition of "telecommunications carrier," which has no analogue in the Communications Act, brings within CALEA's coverage carriers that are not "telecommunications carriers" for purposes of the Communications Act. Thus, whether a particular service falls within Title I or Title II of the Communications Act is not dispositive of whether CALEA applies to the service.

Although many commenters agree with this analysis, others propose various limitations on the interpretation of the term "telecommunications carrier" in CALEA. Each of these arguments is unavailing. *First*, the term "switching" in the definition of "telecommunications carrier" is not limited to traditional *circuit* switching in the public switched telephone network, as at least one commenter suggests.[1/] Instead, the term should be read to include services such as VoIP that use softswitches or routers.[2/] The D.C. Circuit has already confirmed that packet switched services can be subject to CALEA.[3/] That is consistent with both the language of the statute — which nowhere differentiates between different forms of "switching" — and Congress's intent generally to preserve law enforcement's ability to intercept communications involving new technologies.[4/] Indeed, given that in at least some cases carriers are starting to replace circuit switches with packet switches in their public switched telephone networks, a finding that CALEA was limited only to circuit switches would mean that it would no longer even apply to all local telephone exchange service.

Second, as Verizon explained in its opening comments, the Commission correctly concluded that the substantial replacement provision imposes a functional test under which a service is a "substantial replacement" for circuit-switched telephone service if it replaces a

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[1/] Joint Comments of Industry and Public Interest at 32-34.

[2/] *See* Notice of Proposed Rulemaking and Declaratory Ruling, *Communications Assistance for Law Enforcement Act and Broadband Access Services*, 19 FCC Rcd 15676, FCC 04-187 ¶ 43 (rel. Aug. 9, 2004) ("*NPRM*"); Comments of DOJ at 9.

[3/] *United States Telecom Ass'n v. FCC*, 227 F.3d 450, 465 (D.C. Cir. 2000).

[4/] *See* House Judiciary Comm., Communications Assistance for Law Enforcement Act of 1994, H.R. Rep. 103-827(I) at 3502 (1994) (Summary and Purpose) *reprinted in* 1994 U.S.C.C.A.N. 3489 ("House Report") (noting intent of CALEA "to preserve the government's ability, pursuant to court order or other lawful authorization, to intercept communications involving advanced technologies such as digital or wireless transmission modes").

substantial portion of the *functionalities* of local telephone exchange service. *See NPRM* ¶ 44. Under this test, a service is a substantial replacement for POTS if terrorists or other criminals might use the service instead of, and thus as a replacement for, local exchange service.[5/] Those commenters who instead advocate a market-based test, under which a service would not fall within CALEA until it had achieved a particular market penetration or is an "economic substitute" for POTS, would undermine CALEA.[6/] As the Commission noted, although the House Report accompanying the original version of CALEA described the substantial replacement prong of the definition as requiring that a service be used by a "substantial portion of the public within a state," the statute itself requires that the service replace "a substantial portion of the local telephone exchange service." *NPRM* ¶ 44 n.113. The more natural interpretation of the phrase "a substantial portion of the . . . service" is that the new service provide a substantial portion of the functionalities of local telephone exchange service. At the very least, the Commission's tentative conclusion is a reasonable reading of CALEA to which it would be entitled to deference by the courts.[7/] That is particularly true because the Commission's proposed interpretation is more consistent with the statutory purposes. If a service were not subject to CALEA until it reached a particular threshold market share even if it

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5/ *NPRM* ¶ 44; Comments of Verizon at 7-8.

6/ Comments of Electronic Frontier Foundation at 7; Joint Comments of Industry and Public Interest at 35-37; Comments of Level 3 at 10-11; Comments of T-Mobile at 11-12.

7/ *Aid Ass'n for Lutherans v. United States Postal Serv.*, 321 F.3d 1166, 1174 (D.C. Cir. 2003) ("If 'Congress has not directly addressed the precise question at issue,' and the agency has acted pursuant to an express or implied delegation of authority, the agency's statutory interpretation is entitled to deference, as long as it is reasonable.") (quoting *Chevron U.S.A. Inc. v. Nat'l Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984)); *Northeast Maryland Waste Disposal Auth. v. E.P.A.*, 358 F.3d 936, 944 (D.C. Cir. 2004) (agency entitled to deference unless statute unambiguously forbids agency's interpretation).

provided all the same functionalities as local exchange service, then a criminal could evade electronic surveillance simply by using the new service for however long it took (if ever) for that service to reach the relevant share.

Third, the "information services" exception to CALEA's coverage cannot be read to eviscerate the substantial replacement provision. Yet that would be the effect of some commenters' proposal to interpret the "information service" exclusion under CALEA to encompass the same set of services that are "information services" under the Communications Act.[8/] To the extent that such services satisfy CALEA's "substantial replacement" provision, that approach would accomplish through the back door what the Commission has already tentatively (and correctly) concluded cannot be done through the front: interpreting "telecommunications carrier" to be the same under CALEA and the Communications Act by essentially writing the "substantial replacement" provision out of CALEA.[9/] The Commission instead must read CALEA's definition of "information service" in light of CALEA's definition of "telecommunications carrier" so that the two operate in harmony and do not contradict one another.[10/] Thus, the Commission was undoubtedly correct in concluding that "the entities and

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[8/] *See* Comments of Cingular at 6-9; Comments of Earthlink at 3-10; Comments of Electronic Frontier Foundation at 14; Joint Comments of Industry and Public Interest at 29-31.

[9/] *Shalala v. Whitecotton*, 514 U.S. 268, 278 (1995) (noting "the elementary canon of construction that a statute should be interpreted so as not to render one part inoperative") (internal quotation omitted).

[10/] *See, e.g.*, *Crandon v. United States*, 494 U.S. 152, 158 (1990) ("In determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy.").

services subject to CALEA must be based on the CALEA definition . . . *independently of their classification for the separate purposes of the Communications Act*."[11/]

B. VoIP Services

As Verizon explained in its opening comments, and as few commenters question, VoIP services readily meet the substantial replacement provision of CALEA. All VoIP providers, whether network-based or at the application layer, offer a "service" that necessarily involves "switching or transmission" even if the VoIP provider itself does not engage in switching or transmission. VoIP is a replacement for voice phone calls — the central functionality that is provided by local telephone exchange service. Further, subjecting VoIP services to CALEA is in the public interest because an ever-growing share of voice communications otherwise would be exempt from CALEA and thereby potentially outside the scope of law enforcement surveillance. In addition, subjecting VoIP providers to CALEA would promote competition by imposing CALEA obligations on *all* providers of comparable voice services. Finally, contrary to the suggestion of some commenters, VoIP services do not fall within CALEA's exemption for information services.[12/] Thus, for example, the fact that the Commission found the Pulver service to be an information service for regulatory purposes under the Communications Act does not compel the same conclusion in the CALEA context because, as explained above, the relevant statutory definitions are different.

[11/] Second Report and Order, *Communications Assistance for Law Enforcement Act*, 17 FCC Rcd 7105, 7112 ¶ 13 (1999) (emphasis added) ("*Second Report and Order*").

[12/] Comments of Electronic Frontier Foundation at 14-15; Joint Comments of Industry and Public Interest at 31.

While the Commission has correctly reached the tentative conclusion that VoIP services are generally subject to CALEA, as a number of commenters suggest,[13/] the Commission's proposed "managed v. non-managed" test for determining which specific VoIP services are covered is vague and may not capture all services to which CALEA should apply. Specifically, CALEA should apply to all VoIP services that involve the use of equipment such as application servers, media gateways, or networks to provide functions such as switching, transport, or connection management, even if the service is labeled as peer-to-peer. VoIP providers that employ such equipment readily meet the statutory criteria for "telecommunications carrier": they provide an electronic communication switching or transmission service that replaces a substantial portion of local exchange service for their customers in a manner functionally the same as POTS service.[14/] And the public interest in subjecting VoIP providers to CALEA is equally strong regardless of whether the service is "managed" or "unmanaged." Finally, this test would appropriately encompass all VoIP services that permit users to interconnect with the PSTN, as the DOJ advocates:[15/] a VoIP provider that routes calls to or from the PSTN must necessarily use a router or other server to do so.

Consistent with the Commission's apparent intent with respect to its proposed managed/non-managed test, Verizon's proposed test also will ensure that CALEA obligations can apply to VoIP application providers, which in at least some cases will be the only entity that can provide access to the information (e.g., call-identifying information) that law enforcement requires. In Verizon's case, for example, a Verizon Online customer could use Verizon's ISP

13/ *See, e.g.* Comments of SBC at 9-10; Comments of US ISPA at 13-15.

14/ *NPRM* ¶ 56; Comments of DOJ at 33.

15/ Comments of DOJ at 33.

service to access a third-party VoIP application provider. In that case, Verizon would not have the details about the calls a user made or is making, because Verizon's routers would simply direct the relevant packets to the destination IP address included in the packet header (e.g., the address of the VoIP provider's servers) without regard to the application. Neither Verizon Online nor the underlying local telephone carrier would even be aware of whether the packet carries voice, video, or data, let alone what telephone number the caller was dialing using the VoIP service. Thus, law enforcement would have to go to the third party VoIP provider (which would employ servers or other equipment to receive the packets from Verizon Online) to obtain call-identifying information and content for that VoIP service. By contrast, if the Verizon Online customer uses Verizon's ISP service to access a VoIP service that Verizon offers on its infrastructure, Verizon would be able to provide the relevant information about the underlying VoIP call. A test based on whether the VoIP provider uses equipment such as application servers, media gateways, or networks best captures whether providers will be able to provide relevant information to law enforcement under these (and other) scenarios.

C. Broadband Access Services

As explained above, "the entities and services subject to CALEA must be based on the CALEA definition . . . independently of their classification for the separate purposes of the Communications Act."[16/] Thus, the question whether broadband access providers should be classified as common carriers under Title II or as Title I services for regulatory purposes does not affect the CALEA analysis. Rather, the relevant inquiry under CALEA is whether the services involve switching or transmission and are a replacement for a substantial portion of the

16/ *Second Report and Order* at 7112 ¶ 13.

functionality of the local exchange so that the provider should be classified as a "telecommunications carrier" under section 102(8) of CALEA.

No commenters take issue with the proposition advanced in Verizon's opening comments that any CALEA obligations should apply equally to *all* competing providers of broadband access services, regardless of their regulatory classification for purposes of the Communications Act. There is no reason to treat cable modem or satellite services differently from DSL, which the Commission has already concluded is subject to CALEA.[17/] Treating such providers differently would create the possibility that individuals could avoid electronic surveillance simply because the broadband access services they chose did not have to be CALEA-compliant, as well as resulting in competitive distortions.

Nor does the "information service" exception to CALEA change the need to treat all broadband access services equally under the statute, as some commenters suggest.[18/] As explained above, whether such services are information services for purposes of the Communications Act is not determinative of whether those services are information services for purposes of CALEA. If a service is a "substantial replacement" for the functionality of local exchange service, the fact that the service is also an "information service" for purposes of the Communications Act does not take the service out of CALEA's coverage. This interpretation does not, as some commenters suggest, result in reading the information services exception out of CALEA. CALEA's legislative history makes clear that applications that "ride over" the

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[17/] *Second Report and Order* at 7120 ¶ 27.

[18/] *See* Comments of BellSouth at 5-12; Comments of Earthlink at 3-10; Comments of Electronic Frontier Foundation at 14; Comments of Level 3 at 9-11.

underlying broadband transmission may be information services under CALEA so long as they do not independently meet the definition of telecommunications under CALEA as VoIP does.[19/]

If the Commission does conclude that broadband access services fall within CALEA, it should recognize that the underlying network provider cannot be the source of "'one-stop shopping' for law enforcement."[20/] In many cases, this provider will not be in a position to provide the relevant information to law enforcement and should not be the only or first entity to which law enforcement should look for assistance. Thus, the Commission should clarify the relevant obligations of different types of providers where multiple providers are involved in providing service to a single end-user customer. For example, as many commenters suggest, providers who offer a service only at the physical layer should not be obligated to provide information available at the application layer.[21/] In this vein, the DOJ recognizes that a "conclusion that broadband Internet access providers are telecommunications carriers subject to CALEA does not necessarily mean that they are responsible for extracting all of the call-identifying information available within the subject's packet stream, particularly if it pertains, for example, to VoIP services that the carrier does not provide but that its subscribers may use."[22/] The information reasonably available to a provider necessarily varies depending on the particular role — broadband access provider, network service provider, Internet service provider ("ISP"), or application provider — the provider plays.

19/ *See, e.g.*, House Report at 3500.

20/ *See id.* at 3502.

21/ *See, e.g.* Comments of Global Crossings at 11-13; Comments of Level 3 at 12-13; Comments of SBC at 14-15.

22/ Comments of DOJ at 7-8.

In Verizon's basic wholesale DSL transport service, for example, Verizon provides DSL transport via its DSL access multiplexers (DSLAMs) and access to the local network to ISPs who, in turn, offer DSL-based ISP services to their customers.[23/] In this case, Verizon provides layer 2 ATM-based transport service to the ISP. That is, all traffic originating from and destined for the ISP's subscriber is handed off to and received from the ISP (or the ISP's network service provider). In this basic model, Verizon is not involved in IP address assignment, session authentication, or IP packet routing when offering its tariffed DSL service on a wholesale basis. Thus, from Verizon's perspective, the customer appears to be part of the ISP's network and Verizon does not even know the IP addresses associated with the end user or those with which the end user is communicating. In this situation, if law enforcement approached Verizon with a target DSL phone number, Verizon generally could identify which ISP is associated with that phone number. However, the ISP (or its network service provider) receives all the user's traffic and has knowledge of what IP address the user utilizes at any point in time, along with authentication information. As a result, only the ISP (or its network service provider) would have access to certain types of call-identifying information and data associated with that customer, including data routing, user authentication and IP assignments, authorization, and accounting information.

Where Verizon provides retail DSL service through its ISP affiliate, Verizon Online, that affiliate performs the ISP functions described above for its Verizon DSL access (and dial-up) customers. In this scenario, Verizon Online acts like any other ISP that purchases DSL transport

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[23/] This is just one example of a Verizon wholesale service involving broadband access and does not address the many technical variations of that service including, for example, situations in which Verizon may provide additional services to its wholesale customer (e.g., authentication) or where it simply leases an unbundled loop to a CLEC that the CLEC then uses to provide DSL service to its customers.

from Verizon on a wholesale basis, because it performs functions such as user authentication and IP address assignment, and maintains user account and usage information. Verizon Online thus would have certain types of information associated with its ISP service and customer (although, as discussed in Verizon's opening comments, Verizon Online would not generally have access to information above layer 3, including the application layer).

D. Future Services

As the DOJ concedes and the Commission tentatively concluded, it would be improper under CALEA to require manufacturers or service providers to obtain advance clearance before deploying a new technology or service.[24/] The DOJ nonetheless presses the Commission to adopt "streamlined procedures for determining whether particular services and entities in the future are 'telecommunications carriers' subject to CALEA."[25/] Under DOJ's proposal, industry *or law enforcement* would be permitted to seek a ruling from the Commission well in advance of the introduction of the new service, providers would be "require[d] or strongly encourage[d]" to seek guidance from the Commission regarding "whether they [were] subject to CALEA . . . at the earliest possible date," and the DOJ "would certainly consider a service provider's failure to request such guidance in any enforcement action."[26/] The DOJ further proposes, in a footnote, that "[g]oing forward [] carriers should first seek any needed clarification of their CALEA obligations and then proceed to design their networks."[27/]

[24/] Comments of DOJ at 37-38.

[25/] *Id.* at 36.

[26/] *Id.* at 38.

[27/] Comments of DOJ at 45, n.148.

Although Verizon supports the availability of an optional expedited declaratory ruling procedure for carriers that are unsure of their CALEA obligations, the DOJ's proposed procedures and related requirements, coupled with its suggestion that it would engage in greater enforcement action against any carrier that opts not to employ those procedures, would effectively force carriers to obtain the pre-authorization that the DOJ purports to disclaim. That is particularly true given the DOJ's proposal that law enforcement be able to initiate a Commission proceeding to determine the applicability of CALEA to a service prior to its deployment. The DOJ's proposal would thus directly violate the plain language of CALEA, which prohibits law enforcement from requiring a specific design for, or prohibiting the adoption of, equipment, facilities, services, or features.[28/] It also would contradict Congress's intent expressed in CALEA's legislative history, which makes clear that CALEA should be implemented in a way that "serve[s] the policy of the United States to encourage the provision of new technologies and services,"[29/] and not "imped[e] the introduction of new technologies, features, and services."[30/]

II. Compliance

The Commission's proposed compliance deadline of 90 days following its order in this proceeding is unrealistic. Even the DOJ recognizes that additional time will be needed to design and deploy intercept solutions, proposing that carriers instead be given one year after a coverage determination to deploy and make available CALEA-compliant intercept solutions to law enforcement, including designing solutions, working with vendors, and deploying and testing the

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28/ 47 U.S.C. § 1002(b)(1)(A), (B).

29/ 47 U.S.C. § 1006(b)(4).

30/ House Report at 3489; *see also id.* at 3493-94.

intercept solutions.[31/] While the DOJ's proposal takes a step in the right direction, it is likely to be insufficient for many services. In particular, although 12 months may be an appropriate deadline for the Commission to adopt for VoIP services (subject to the availability of extensions if a carrier makes the requisite showing) because standards have been completed for those services and vendors already are working on solutions, that time period is not sufficient for broadband access services.

The DOJ's belief that 12 months is a reasonable timeframe for compliance for broadband access services appears to be grounded on the erroneous assumption that "CALEA-compliant solutions are presently available in the marketplace — e.g., standards and/or intercept solutions already exist for . . . Internet access."[32/] In reality, although the industry has made progress in defining some of the relevant standards for broadband access services and continues to do so, much work remains. The development of CALEA capabilities for today's packet-mode services, including broadband access services, is very different from, and significantly more complicated than, solutions for the packet services that were at issue in 1999 when the applicability of CALEA to packet-mode services was first raised. Not surprisingly, then, the record is devoid of any evidence to support the availability of a generally applicable broadband access solution. While the TIA standard-setting body has approved J-STD-025-B,[33/] that standard includes only high-level requirements common across all packet services, not the technical detail required to develop CALEA solutions for particular broadband access services. Industry and law enforcement

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31/ *See* Comments of DOJ at 57-58.

32/ *Id.* at 65.

33/ TIA Standard/ATS Committee T1 Trial Use Standard, "Lawfully Authorized Electronic Surveillance" J-STD-025-B.

representatives continue to participate in ongoing meetings to work on the development of the IP Network Access standard for certain broadband access services. There accordingly are not yet accepted standards, let alone "off the shelf" solutions, for broadband access services, as the DOJ suggests.

To be sure, the absence of industry standards does not excuse carriers' obligations to comply with CALEA. However, the industry does not yet know what it means to apply CALEA to broadband access services. Until there is some consensus among the industry and law enforcement concerning issues such as what constitutes call-identifying information for broadband access services — an understanding that is most likely to be achieved in the context of the standards process — a carrier and its vendors would not even know whether any custom solution would in fact be providing the requisite capabilities and would face the real danger of having to start over again if the standard diverged substantially from their initial understanding of CALEA's requirements. CALEA clearly makes industry standards and safe harbors a focal point of compliance. The Commission should not simply ignore the substantial progress that industry and law enforcement have made, and continue to make, on those standards. Nor should the Commission's compliance deadlines ignore the reality that most carriers, including Verizon, employ open standards across vendors and providers, and that most manufacturers build to a single industry standard rather than creating a custom solution for each carrier. This approach is more efficient and reduces costs for manufacturers, carriers, and law enforcement.

In these circumstances, the Commission should not adopt the DOJ's proposed one-year compliance deadline for broadband access services. Instead, the Commission should adopt a timeline that incorporates the time needed to resolve standards for broadband access. In particular, the Commission should require quarterly reports from the ATIS standard-setting body

overseeing work on the IP network access standard concerning the progress that is being made on the development of that standard, which is expected to be complete in 2005. Once that standards process is complete, the Commission could initiate an expedited proceeding to determine an appropriate deadline for compliance for broadband access services, keeping in mind the many steps that follow approval of a standard, including vendors' work to develop new software, equipment, and network elements, carriers' formal testing and further development to ensure the solution meets the relevant requirements, and carriers' rollout of the new solution in their networks. In conjunction with that proceeding, it may also make sense for law enforcement to create an analogue to the Flexible Deployment Program for broadband access services, to ensure that law enforcement and industry work cooperatively to deploy solutions for broadband access services as soon as possible in high priority areas.

Whatever timeframe the Commission adopts, it must also permit carriers to seek extensions pursuant to section 109 in a manner consistent with the statute. As many commenters note, the Commission's proposal to permit relief under section 109 only in "extraordinary cases" is inconsistent with CALEA.[34/] The Commission must apply CALEA's "reasonably achievable" statutory standard to section 109 petitions, without creating presumptions against relief found nowhere in the statute. The Commission also cannot, as it proposes, simply ignore the absence of available technology or equipment in determining whether relief under section 109 is appropriate, because the absence of such technology is certain to "impose significant difficulty or expense on the carrier" and therefore, under the terms of the statute, make compliance not

[34/] *See, e.g.* Comments of BellSouth at 30-32; Comments of Global Crossings at 14; Joint Comments of Industry and Technology at 50-51; Comments of USTA at 16-17.

reasonably achievable.[35/] In addition, CALEA's enforcement section permits a court to issue an enforcement order only if "compliance . . . is reasonably achievable *through the application of available technology*." 47 U.S.C. § 1007(a)(2) (emphasis added). It would make little sense to find that a carrier is not permitted to obtain an extension based on the absence of available technological solutions even though it cannot be sanctioned for non-compliance for that very reason. Ignoring the absence of available technology would also make carriers responsible for their vendors' failures to meet CALEA's requirements in contravention of CALEA's requirement that *manufacturers* make available to telecommunications carriers the modifications necessary to permit carriers to comply with CALEA.[36/]

Of course, carriers should make commercially reasonable efforts to work with their vendors to develop CALEA solutions for their systems. Some of the Commission's proposed requirements for section 109 petitions are appropriately designed to elicit this information.[37/] But if a carrier demonstrates commercially reasonable efforts to comply with CALEA in its petition, the fact that technology and equipment is not available should create at least a presumption that a carrier is entitled to relief.

Moreover, whether a carrier made reasonable efforts needs to be evaluated in context: for example, if the Commission were to conclude that particular broadband access services are subject to CALEA and industry standards existed for those services, then a carrier that was preparing to offer such a service subsequent to the Commission's order may well have to show

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[35/] 47 U.S.C. § 1008(b)(1).

[36/] 47 U.S.C. § 1005(b).

[37/] By contrast, as Verizon explained in its opening comments, other pieces of information that the Commission proposes to require as a precondition for obtaining an extension are inappropriate or unrealistic. Comments of Verizon at 19-20.

that it made efforts during the planning and development of that service to bring it into compliance with CALEA in order to justify any extension request. By contrast, if a provider were developing an entirely new service for which the applicability of CALEA was unclear and/or no standards yet existed, the threshold for "commercially reasonable" efforts would be significantly lower. Otherwise, the Commission would effectively force carriers to obtain law enforcement's pre-approval for new services and allow law enforcement to dictate the specific design of the provider's equipment, facilities, services, features, or system configurations, in direct contravention of CALEA.[38/]

III. Call-Identifying Information

As Verizon explained in its opening comments, and as most commenters, including the DOJ, agree, the issue of what constitutes call-identifying information in the context of packet-mode technologies is too complex to be determined through this proceeding.[39/] As the DOJ notes, almost every one of the individual technical standards issues raised by the Commission is sufficiently significant, complex, and controversial to warrant its own rulemaking.[40/] And this rulemaking proceeding, unlike a proceeding evaluating a single concrete standard, does not permit the Commission to respond to a well-defined dispute rather than conjecture.[41/] Instead, the most the Commission could do here would be to list a few broad categories of information and require that they be provided to law enforcement. As Verizon explained in its opening

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[38/] 47 U.S.C. § 1002(b)(1).

[39/] *See, e.g.*, Comments of DOJ at 39-40; Comments of BellSouth at 15-20; Comments of US ISPA at 32.

[40/] *See* Comments of DOJ at 41.

[41/] *Id.* at 42-43.

comments, the Commission's attempt to do that in the NPRM resulted in categories that were unworkable and that oversimplified the complexities involved in determining when and to whom particular call-identification information is reasonably available.[42/]

The standards process is a better forum for resolving the myriad technical details and definition of what data elements are part of call-identifying information, which will vary by service, and which particular pieces of call-identifying information each type of entity subject to CALEA must provide. That process has already made substantial progress in developing standards for VoIP services, and industry is actively working on standards for other packet-mode services. If, in the future, any party believes that any standard that results from that process is inadequate, it can file a deficiency petition with the Commission.

IV. Trusted Third Parties

Commenters are in near-universal agreement that Trusted Third Parties may be a useful method of helping some carriers comply with CALEA, but that the use of Trusted Third Parties should not be required of any carrier.[43/] Given the wide variety of means carriers employ to provide service and to pass information to law enforcement, there is no single solution for providing call-identifying information that will work effectively for all carriers, nor would requiring any single network design be consistent with CALEA.[44/] Trusted Third Parties also

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42/ *See* Comments of Verizon at 21-23.

43/ *See, e.g.* Comments of BellSouth at 43-44; Joint Comments of Industry and Public Interest at 51; Comments of Level 3 at 2, 7; Comments of Nextel at 8; Comments of SBC at 18-20; Comments of T-Mobile at 23; Comments of US ISPA at 27-30.

44/ *See* House Report at 3502 ("The question of which communications are in a carrier's control will depend on the design of the service or feature at issue, which this legislation does not purport to dictate"); *id.* at 3489 (CALEA should not "imped[e] the introduction of new technologies, features, and services").

raise a host of privacy, security, and engineering issues. Thus, even if the Commission concludes that Trusted Third Parties can be an effective method of providing call-identifying information, it should not require carriers to use that approach. In the same vein, the Commission must recognize that the mere availability of a Trusted Third Party solution for one carrier does not necessarily make information reasonably available to any other carrier:[45/] Even if a Trusted Third Party offers a workable solution for one carrier, it will not necessarily work for others.

V. Enforcement

As noted by most commenters, the Commission's proposal to adopt enforcement measures beyond those already provided in section 108 of CALEA is unnecessary and contrary to CALEA.[46/] The detailed requirements of section 108 cannot and should not be circumvented by an extra-statutory enforcement measure. Nor is there any basis on the record to conclude that Commission presently lacks sufficient enforcement authority or needs to create some kind of new enforcement mechanism. The Commission already has procedures available to it to require carriers to comply with lawful orders and rules and to investigate alleged non-compliance.

VI. Costs

Carriers should not bear sole responsibility for all post-1995 capital costs associated with electronic surveillance, as the DOJ suggests.[47/] Nothing in the relevant statutory provisions

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45/ *See* Comments of Nextel at 8; Comments of TIA at 19; Comments of US ISPA at 28-29.

46/ *See, e.g.*, Comments of BellSouth at 38-40; Comments of CTIA at 10-12; Joint Comments of Industry and Public Interest at 52-53; Comments of Motorola at 20-23; Comments of Nextel at 11-12; Comments of SBC at 24-25; Comments of TIA at 4-7; Comments of US ISPA at 41-44; Comments of USTA at 11-12.

47/ *See* Comments of DOJ at 92-93.

supports the distinction the DOJ purports to draw. The DOJ correctly notes that CALEA itself requires federal law enforcement agencies to bear many of the costs of CALEA compliance for pre-1995 equipment, as well as the compliance costs for post-1995 equipment where compliance is not reasonably achievable. But the creation of these additional reimbursement mechanisms in CALEA did not extinguish or modify the pre-existing right of carriers under Title III to recover from law enforcement their "reasonable expenses" in connection with the provision of intercepts.[48/] Furthermore, nothing about that cost recovery provision excludes "capital" costs or draws the temporal distinction found in CALEA; to the contrary, it specifically permits recovery for "*facilities* or assistance." For this reason, the Commission has already properly concluded that providers can "recover at least a portion of the CALEA software and hardware costs by charging to [law enforcement], for each electronic surveillance order authorized by CALEA, a fee that includes recovery of capital costs, as well as recovery of the specific costs associated with each order."[49/]

This does not mean, however, that law enforcement will be responsible for millions of dollars in compliance costs or that the charges imposed on law enforcement will approach tens of thousands of dollars per intercept, as one commenter posits.[50/] Rather, the capital costs for which law enforcement is responsible should be those incurred in provisioning intercepts to law

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[48/] 18 U.S.C. § 2518(4) ("Any provider of wire or electronic communication service, landlord, custodian or other person furnishing such facilities or technical assistance shall be compensated therefore by the applicant for reasonable expenses incurred in providing such facilities or assistance").

[49/] Order on Remand, *Communications Assistance for Law Enforcement Act*, 17 FCC Rcd 6896, 6916-17 ¶ 60 (2002) ("*Order on Remand*").

[50/] *See* Comments of New York Attorney General at 14.

enforcement, including, for example, the costs of delivering traffic to law enforcement.[51/] Unlike in circuit-switched networks, law enforcement cannot obtain dial out or dial up access to the central office switch to obtain the intercepted information. Instead, in a decentralized packet-switched network, carriers must "backhaul" traffic to a central intercept point. Under Title III and the Commission's previous explicit findings, law enforcement is responsible for the costs carriers incur to backhaul traffic in this manner.

Further, as explained in Verizon's opening comments, the Commission should make clear that carriers have the option of recovering their CALEA compliance costs (to the extent they are not recovered from law enforcement) from their customers in any legal manner they choose, such as by giving price cap carriers the option to file a tariff with the Commission enabling the carrier to recover CALEA costs through a competitively-neutral federal surcharge

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[51/] 47 U.S.C. § 1002(a)(3) (explaining carriers' responsibility for "delivering intercepted communications and call-identifying information to the government, pursuant to a court order or other lawful authorization, in a format such that they may be transmitted by means of equipment, facilities, or services *procured by the government* to a location other than the premises of the carrier") (emphasis added).

that applies to end users, as well as wholesale customers. This approach appropriately reflects the wide variety of the types of carriers and services subject to CALEA, and the corresponding variety of means that may be appropriate for carriers to recover their CALEA costs.

Respectfully submitted,

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